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No. 84-1485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BEST AVAILABLE COPY

JOHN MORAN, Superintendent
Rhode Island Department of Corrections,
Petitioner,

v.

BRIAN K. BURBINE,
Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF OF THE RESPONDENT

PAULA ROSIN
Assistant Public Defender
Appellate Division

Office of the Public Defender
230 Benefit Street
Providence, Rhode Island 02903
(401) 277-3492
Attorneys for the Respondent

ROBERT B. MANN
(Counsel of Record)
130 Pitman Street
Providence, Rhode Island 02906
(401) 351-5770

WILLIAM F. REILLY
Public Defender

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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STATEMENT OF THE CASE

On June 29, 1977, sometime between 3:00 and 4:00 p.m., police officers from Cranston, Rhode Island arrested three men in connection with an alleged breaking and entering (S.H. 126-27, 145).[1] One of these men was Brian Burbine; the other two were Donald Sparks and a man named DiOrio (S.H. 20, 122, 126, 145-47). At the time, Brian Burbine was twenty-one years old and had only a fifth grade education (S.H. 193). Prior to his arrest, Brian Burbine had been involved in one other criminal matter—a pending breaking and entering charge on which he was represented by Deputy Public Defender Richard Casparian, with whom Mr. Burbine had not yet consulted (S.H. 111, 190, 203, 248).

All three suspects were taken to the Cranston police station where they were processed, and then were brought to the detective division (S.H. 145-146). The men were placed in separate interrogation rooms, which were situated just off the main investigating room of the detective division (S.H. 146, 150). The detective division in the Cranston station consists merely of one large, main room, with telephones in it, and six separate, smaller rooms adjoining the main area (S.H. 20-21, 48, 64, 172). Once Mr. Burbine and his co-defendants were placed in the detective division, the case was turned over to Lt. Raymond Ricard and Det. Nicholas Ferranti who took charge of the investigation (S.H. 123). Ferranti testified that two days prior to Mr. Burbine's arrest, he had received information from an informant that a man named "Butch" who lived at 306 New York Avenue in Providence was responsible for

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[1] The transcripts which are part of the record are designated as follows: Suppression Hearing; February 15-16, 19-20, 1979, as "S.H."; Trial Transcript; Volume I, February 21-23, 27, 1979 and Volume II, February 28 and March 1, 2, 1979, as "T."

the killing of a woman named Mary Jo Hickey in Providence three months earlier (S.H. 47, 147). Ferranti checked the information received on the three men and found that Brian Burbine and DiOrio had given 306 New York Avenue as their home address (S.H. 147). Ferranti questioned DiOrio who stated that Brian Burbine was the only person living at that address who was called "Butch" (S.H. 147).

Armed with this information, Ferranti confronted Mr. Burbine in the interrogation room to question him about the Providence murder (S.H. 148).[2] Ferranti claimed that he informed Mr. Burbine of his constitutional rights, but Mr. Burbine refused to sign the rights form or talk about the homicide (S.H. 148-49, 171, 190). Ferranti asked Mr. Burbine if he knew anyone named Butch who lived on New York Avenue; Mr. Burbine responded that he was the only person called "Butch" who lived there (S.H. 148).

Det. Ferranti then left Brian Burbine in the interrogation room, and spoke with DiOrio and Sparks (S.H. 149). Both men gave statements implicating Mr. Burbine in the Providence homicide (S.H. 149-50). Ferranti contacted Captain Richard Wilson of the Providence Police Department: the time was approximately 6:00 p.m. (S.H. 150). Captain Wilson, along with Lt. Bernard Gannon and Det. Edward Trafford, responded to the Cranston station with the express purpose of questioning Brian Burbine as a suspect in the murder investigation (S.H. 3, 49, 78). They

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[2] Contrary to the representation made by the Justice Department in its amicus brief, Brian Burbine was never interrogated about the breaking and entering for which he was arrested on June 29, 1977. A review of Detective Ferranti's testimony reveals this, notwithstanding the observation by the Rhode Island Supreme Court that Mr. Burbine had been interrogated about the breaking and entering. *State* v. *Burbine*, 451 A.2d 22, 29-30, n.5 (R.I. 1982) (Pet. App. 64).

arrived at approximately 7:00 p.m., went to the detective division, spoke with Det. Ferranti and Lt. Ricard, and then questioned Sparks, with Ferranti in attendance (S.H. 4, 19-20, 77-78, 151).

While these events unfolded in Cranston, Sheila Ray, Brian Burbine's sister, called the Public Defender's Office to seek assistance for her brother (S.H. 70-71). As noted above, Mr. Burbine was a current client of the Public Defender's Office. Barbara Hurst, an appellate attorney, took the call at approximately 7:45 p.m. (S.H. 71-72). Ms. Ray informed Ms. Hurst that her brother was a current client of the office, and, in fact, Mr. Burbine had had an appointment to meet with Mr. Casparian that very afternoon which he had missed due to his arrest (S.H. 72-74). Barbara Hurst was unable to reach Richard Casparian, so she called another assistant Public Defender, Allegra Munson, and informed Ms. Munson of the telephone conversation with Mr. Burbine's sister (S.H. 71, 73).

Allegra Munson called the Cranston police station at approximately 8:15-8:20 p.m., and asked that her call be transferred to the detective division (S.H. 243, 245, 249). At that time, according to the testimony of Lt. Ricard of the Cranston Police, who was in charge of the detective division that night, he and Det. Ferranti were the only police officers working in the detective division that night, and although there may have been others working in the field, these other detectives were not around the office at all (S.H. 130, 142-143). Ricard stated that there were no patrol officers present in the detective division, and that the officer who arrested Mr. Burbine and his co-defendants was not in the station (S.H. 135).

Det. Ferranti testified that, at the time in question, only he and Ricard were working in the detective division, but there might have been a third officer working on an

unrelated murder case (S.H. 166, 179). Both Ferranti and Ricard testified that, had an attorney called the station inquiring about Mr. Burbine, the call would have been taken by one of three persons—Ferranti, Ricard, or Captain Ernest Delmonico, the officer in charge of the station that night (S.H. 125, 133-35, 143-44, 178-79). At the time of Attorney Munson's call, all three Cranston officers were aware that the Providence police were present in the station and intended to interrogate Brian Burbine about the Providence homicide (S.H. 124, 127-28, 149-51, 265-66).

Attorney Munson testified that, after she asked that her call be switched to the detective division, a man answered the phone and said "detectives" (S.H. 249-50). Ms. Munson told the officer on the phone her name, and that she was an attorney in the Public Defender's Office (S.H. 250). Attorney Munson then asked if Brian Burbine was being held and the officer responded affirmatively (S.H. 250). Ms. Munson explained to the officer that Brian Burbine was represented by Richard Casparian, Deputy Public Defender, who was unavailable, and that if the police intended to put Mr. Burbine in a lineup or question him, Ms. Munson would act as his legal counsel (S.H. 250-51). The officer on the phone told Ms. Munson that the police would *not* be questioning Brian Burbine or putting him in a lineup and that they were through with Mr. Burbine for the night (S.H. 251). The officer did not inform Ms. Munson of the homicide investigation or the fact that the Providence Police were in the Cranston station, on the verge of interrogating her client (S.H. 261). Believing that the police had no intentions of questioning Mr. Burbine, and knowing nothing about the Providence homicide for which Mr. Burbine was a prime suspect, Ms. Munson terminated the call (S.H. 244, 258). The trial

justice found as fact that Ms. Munson's call was made as she had testified (T.3) (Pet. App. 114).

Every police officer purportedly present in the Cranston station that night who was aware of Brian Burbine's situation—both Providence and Cranston police—all denied any knowledge of Attorney Munson's phone call (S.H. 11-12, 53, 119, 125-26, 141-42, 178-79, 264). Although Lt. Ricard and Det. Ferranti insisted that, had the call been made they would have received it, they denied having any contact with the attorney (S.H. 125, 130, 133-34, 142-43, 178-79). Captain Delmonico, the officer in charge of the station on the night in question, admitted that if the call had not gone to Ricard and Ferranti, it would have gone to him, but he too denied any knowledge of the call (S.H. 264-65). The Providence police officers likewise professed ignorance of the attorney's telephone contact (S.H. 11-12, 53, 119). The police officers involved offered no other explanation for what transpired on the phone except that Attorney Munson never made the call.[3] The trial justice rejected this explanation, find-

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[3] It was the Providence police, not the Cranston police, who testified that there may have been other Cranston police personnel present in the detective division that night (S.H. 5, 79). However, none of these "other officers", if in fact there were any, would have known anything about Brian Burbine and his situation. The officer who spoke with Allegra Munson that night was completely aware of Mr. Burbine's status—he did not have to leave the phone to inquire about Mr. Burbine. At the suppression hearing, the state never claimed that another officer might have answered the phone and unwittingly given Attorney Munson the wrong information. The state never presented anyone who testified that they took the call. Most importantly, the three Cranston police officers who testified, vehemently insisted that they and only they would have taken the call had it been made. Thus, the police position at the suppression hearing was that Attorney Munson was lying—a position explicitly rejected by the trial judge.

ing Ms. Munson a credible witness (T.3) (Pet. App. 114).

Barely an hour after Attorney Munson's call, Brian Burbine was brought into the main room of the detective division, surrounded by both the Cranston and Providence police (S.H. 20-21, 152-54). The police testified that they advised Mr. Burbine of his *Miranda* rights and he denied any involvement in the homicide and refused to speak further (S.H. 20-21, 152-53). The police returned Mr. Burbine to the interrogation room (S.H. 153). About ten minutes later, according to the police, Mr. Burbine banged on the door of his interrogation room and said that he wanted to talk (S.H. 22, 153-54).

At approximately 9:30 p.m., Providence detectives Gannon and Trafford, with Cranston detective Ferranti in attendance, interrogated Brian Burbine about the killing of Mary Jo Hickey, and secured the first of three confessions from him (S.H. 21-23, 28-29, 103, 156, 168). The police never informed Mr. Burbine of his attorney's phone call. At approximately 11:20 p.m., the police extracted a second incriminating statement from Mr. Burbine (S.H. 33-34, 37-38). The Providence police finally left the Cranston station at midnight (leaving Mr. Burbine in the custody of the Cranston police) (S.H. 39).

The next morning, June 30, 1977, the police succeeded in making another "end run" around Mr. Burbine's attorney, by voluntarily dropping the original felony charge of breaking and entering so Brian Burbine could plead to a misdemeanor charge of malicious damage, without the advice of an attorney. The Cranston police took Mr. Burbine to the Eighth Division District Court, where members of the Providence police department were waiting, armed with an arrest warrant for Mr. Burbine (S.H. 13-14). Although Mr. Burbine was not repre-

sented by legal counsel, the district court judge accepted his plea of guilty to the charge and sentenced Mr. Burbine to six months imprisonment (S.H. 240-41)[4] The judge then ordered that the sentence was to commence upon Mr. Burbine's release from the Providence police (S.H. 240-41). The Providence police took Brian to headquarters, placed him in an interrogation room, and questioned him again, securing a third confession (S.H. 89-95).

After successfully obtaining this third statement from a still uncounseled Brian Burbine, Det. Trafford testified that he planned to put Mr. Burbine in a lineup and the police finally called the Public Defender's Office (S.H. 95, 269). Richard Casparian immediately went to the Providence police station to consult with his client (S.H. 191-92).

Among other things, Brian Burbine testified at the suppression hearing that at approximately 7:00 p.m., he overheard a phone call that took place between Lt. Ricard and his sister. (S.H. 216).[5]

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[4] Had Brian Burbine been presented on the felony charge of breaking and entering, the district court would not have had the jurisdiction to accept a plea and, if Mr. Burbine had indicated that he could not afford an attorney, the court would have referred him to the Public Defender's Office. The court also would have had to set bail on the charge.

Brian Burbine testified at the suppression hearing that, when the judge accepted his uncounseled guilty plea to the reduced misdemeanor charge, the judge only inquired as to whether Brian understood why he was pleading guilty (S.H. 238-39). The judge did not advise Mr. Burbine that he had the right to the presence of an attorney prior to any questioning, nor did the court advise him of his pre-interrogation rights (S.H. 239). This testimony was not refuted by the state.

[5] This testimony would explain the fact that Sheila Ray, Brian

The facts as set forth above were testified to at the hearing on Mr. Burbine's motion to suppress the three inculpatory statements, and the tangible evidence seized as a result thereof.

SUMMARY OF THE ARGUMENT

At the time Brian Burbine was arrested by the police and targeted for interrogation as a suspect in a homicide, he was twenty-one years old, with only a fifth grade education. His prior contacts with the criminal justice system were exceedingly minimal. Despite these handicaps, Brian Burbine attempted, on two different occa-

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Burbine's sister, was aware that her brother had been arrested, was being held by the Cranston police, and knew that the arrest was on a charge of breaking and entering. The police witnesses denied talking to Mr. Burbine's sister that night (S.H. 53, 131, 178).

Brian Burbine also testified at the suppression hearing that at approximately 7:00 p.m., the police brought him into the main room of the detective division, showed him a picture of Mary Jo Hickey, and asked him if he knew her—all without advising Mr. Burbine of his rights (S.H. 196-197). Mr. Burbine told the police he knew Ms. Hickey and stated that he did not want to talk about the matter any more (S.H. 197). The police put Mr. Burbine back in the interrogation room, although he'd asked to be put in the cellblock, and about fifteen minutes later, Ferranti came in and started questioning him again (S.H. 197-198). Again, Ferranti did not give Mr. Burbine his *Miranda* rights (S.H. 199). Ferranti left the room, and returned later with the Providence police officer; the police did not advise Mr. Burbine of his rights but just told him to sign a rights form, and then interrogated him (S.H. 199-203). Brian Burbine testified that he wanted an attorney and the opportunity to make a phone call (S.H. 202-203). Mr. Burbine also stated that he was intoxicated at the time of his arrest, and signed the rights form and confession because he was not "all together," his mind "wasn't there" and he "wasn't thinking right" (S.H. 212, 213).

The trial judge did not credit Mr. Burbine's testimony regarding the interrogations.

sions, to prevent the police from interrogating him about the homicide. Yet, after six hours in custody, Brian Burbine lost his battle with the police—a battle that he waged alone as he had no idea whatsoever that his attorney had called the police station and would have been available to intercede on his behalf had the police not told her that they had no intention of interrogating her client.

One of the issues raised by the petitioner is the question of whether there exists a substantial difference between an abstract offer by the police, imparted to the accused pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), to secure legal counsel and the knowledge that a specific attorney is available for consultation prior to questioning. While this interesting issue lurks in the background of this case, this Court need not address the question of whether, if the police are contacted by an attorney, and deal honestly with that attorney, the police are obligated to inform the accused of the attorney's availability. Here, the police lied or deceived Brian Burbine's lawyer, and all this Court need do is reach the question of what legal consequences must flow from this type of police misconduct.

The petitioner in this case, and the amici who have filed briefs in support of petitioner's position, are asking this Court to hold that, as long as the police advise a suspect of his or her *Miranda* rights, the police may deliberately or recklessly mislead that suspect's attorney about their intention to interrogate and effectively destroy the attorney/client relationship. The petitioner asks this Court to find that Brian Burbine knowingly and voluntarily waived his constitutional rights, even though prior to interrogation his attorney contacted the police, asked if her client was going to be interrogated, and was explicitly and falsely told that there would be no questioning.

Brown v. Illinois, 422 U.S. 590 (1975) rejected the proposition that improper police conduct could be sanitized by utilization of the *Miranda* warnings. In this case, the petitioner seeks to accomplish the same result by insulating from judicial review police conduct that preceded the giving of the warnings.

The position advocated by the petitioner has been rejected by the vast majority of appellate courts that have considered this question. The decision of the United States Court of Appeals for the First Circuit was consistent with prior precedent, and reaffirmed the view adopted by other appellate courts that the intervention of an attorney on behalf of an accused who has been arrested and is the target of custodial interrogation is a legally significant event that implicates the constitutional safeguards of the Fifth Amendment, requiring the police to act honestly and responsibly with both the attorney and the client by accurately informing the attorney of his or her client's status and the client of the attorney's efforts. These holdings discourage and deter culpable misleading of an attorney and the attorney's client.

Contrary to the petitioner's claim, Mr. Burbine is not asking this Court to hold that the United States Constitution requires that the police may not secure a waiver of the right to counsel from a represented suspect without the presence of counsel. Mr. Burbine merely asks this Court to hold that when the police deliberately or recklessly deceive a suspect's attorney and the suspect himself, regarding interrogation, any confession obtained as a result of the exploitation of that deception is not admissible at a later trial.

The First Circuit Court of Appeals rested its decision on Fifth Amendment grounds alone, and declined to reach the respondent's Sixth and Fourteenth Amendment

argument. Nevertheless, those arguments provide separate bases for affirming the lower court's opinion, and, accordingly, those arguments are presented herein.

The petitioner also questions whether the First Circuit paid sufficient deference to state court findings of fact, as required by this Court in *Sumner v. Mata*, 455 U.S. 591 (1982), Pet. Brief at 28. Contrary to the petitioner's suggestion, the Court of Appeals adhered strictly to the findings of fact by the state courts. There is nothing at all in the findings of the state courts to rebut the conclusion of the Court of Appeals that the actions of the police department were either reckless or deliberate.

INTRODUCTION

At the very moment the police stood poised and ready to interrogate Brian Burbine about the homicide, Mr. Burbine's attorney was at home, secure in the knowledge that the police had no intention of questioning her client. At that same moment, Brian Burbine was secure in the knowledge that, after six hours of being held incommunicado, there was no one outside the environment of the police station who was going to come to his aid. Both Mr. Burbine's and his attorney's "security" were completely unfounded, being based on deception perpetrated by the police. This Court must decide whether the police shall be allowed to exploit that deception, or whether the law requires the police to deal honestly, accurately and fairly with an attorney and client.

I. MIRANDA WARNINGS DO NOT CURE THE VIOLATION OF CONSTITUTIONAL RIGHTS THAT OCCURS WHEN THE POLICE, INTENDING TO INTERROGATE A SUSPECT, DELIBERATELY OR RECKLESSLY MISLEAD THAT SUSPECT'S ATTORNEY ABOUT THE PLANNED INTERROGATION.

The police in this case either deliberately or recklessly misled Brian Burbine's attorney. The petitioner asks this

Court to disregard that conduct. Petitioner argues that, because Brian Burbine was advised of his *Miranda* rights, whatever transpired before between the attorney and the police is immaterial. That argument is patently offensive to recognized notions of how the police and defense attorneys are supposed to deal with each other.

If the type of misconduct that took place in this case is rendered legally irrelevant simply because the police gave Mr. Burbine *Miranda* warnings, then defense counsel will be unable to represent clients who have been arrested by the police and are being held in custody pending interrogation. If, as petitioner argues here, the police can misrepresent whether or not interrogation will take place, as long as they claim a later *Miranda* advisement, then all manner of deception will be "cured" by *Miranda* warnings.

If the police can misrepresent whether or not there will be interrogation, then they can misrepresent *when* there will be interrogation. The police could tell a defense lawyer that questioning will commence in two hours, and then start the interrogation immediately. The police could also lie about where the interrogation will take place. They could tell an attorney that interrogatin will take place at the station, and, just as the attorney arrives, they could whisk the defendant out the back door and interrogate him or her in another location. The police could lie about whether the defendant was in custody, telling an attorney that the client had made bail when, in fact, the client was still being held. The police could lie about the charges against the client, and about the court in which the defendant was to be arraigned. In short, the police could do anything they wanted to make sure that the attorney did not intercede prior to interrogation and, according to petitioner's argument, any deceptive tactics

employed by the police would be forgiven by the simple expediency of *Miranda* warnings.

Petitioner evinces no concern about the treatment afforded to the attorney in this case, or to any attorney, and fails to articulate any limits on the ability of the police to deceive. Under petitioner's theory, as long as *Miranda* warnings are given and those rights are waived, what the police do with an attorney is legally irrelevant. The police may lie, deceive, or misrepresent, in order to keep a suspect incommunicado, despite any and all efforts by that suspect's attorney to gain access. The petitioner makes much of the fact that the trial justice found there was no conspiracy or collusion by the police. Pet. Brief a 9, 22, 26. Yet, the petitioner's position makes this point irrelevant, because the petitioner argues that what occurred before the *Miranda* warnings were given simply does not matter.

This Court has rejected the notion that *Miranda* warnings cure otherwise unconstitutional conduct on the part of the police. In *Brown* v. *Illinois*, 442, U.S. 590 (1975), the defendant was arrested illegally, and a confession was obtained after the police advised the defendant of his *Miranda* rights, and the defendant executed a waiver of those rights. In *Brown*, the state argued, as it does here, that the *Miranda* warnings dispelled the taint of the unconstitutional police conduct. This Court rejected that contention, stating:

> If *Miranda* warnings by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. See *Davis* v. *Mississippi*, 384 U.S. 721, 726-727, 89 S.Ct. 1394, 1397, 22 L.Ed.2d 676 (1969).

Brown v. *Illinois*, 422 U.S. at 602. The Court went on to explain that such a policy would encourage arrests without probable cause or warrants if law enforcement officials believed they could remedy such problems by giving *Miranda* warnings. The Court then said:

> Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a "cure-all," and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to "a form of words." See *Mapp* v. *Ohio*, 367 U.S. at 648, 81 S.Ct. at 1687.

Id., 422 U.S. at 602-603. In this case the petitioner seeks to make the *Miranda* warnings a "cure-all" for deliberate or reckless deception of the defendant's attorney. In its decision, the First Circuit recognized the implications of tolerating such behavior. In finding that the actions of the police had vitiated the voluntary and knowing nature of a waiver of counsel, the Court said:

> Were this not so, the proper role of a defense counsel would be meanly diminished. If police officers with a more than warm suspect in their custody were permitted to engage in frustrating dissimulation with impunity, they would have to be more than human to resist the temptation to mislead the suspect and his counsel.

Burbine v. *Moran*, 753 F.2d 178, 187 (1st Cir. 1984) (Pet. App. at 20).

The First Circuit's words echo the holdings of the vast majority of appellate courts that have considered the same issue in factual situations that parallel the facts of this case. *See, Dunne* v. *State*, Texas Ct. of Crim. App. 248-84 (June 26, 1985) 37 *Cr. L. Rptr.* 2274 at 2275; *Lodowski* v. *State*, Maryland Ct. of App. No. 154, (April 23, 1985), 37 *Cr. L. Rptr.* 2144, 2145; *Alphodi* v. *State*, 61

Md. App. 132, 485 A.2d.275 (Md. App. 1985), *cert. den.* 303 Md. 42, 491 A.2d. 1197 (1985); *Lewis* v. *Oklahoma*, 695 P.2d 528 (1984); *Weber* v. *State*, 457 A.2d 674 (Del. 1983); *Commonwealth* v. *Sherman*, 389 Mass. 287, 450 N.E.2d 566 (Mass. 1983); *People* v. *Smith*, 93 Ill.2d 179, 422 N.E. 2d 1325 (Ill. 1982), *cert. den.* 461 U.S. 937 (1983); *State* v. *Matthews*, 408 So.2d 1274 (La. 1982); *State* v. *Haynes*, 41 Or. App. 465, 602 P.2d 272 (Ore. *en banc* 1979), *cert. den.* 446 U.S. 945 (1980); *State* v. *Jones*, 19 Wash. App. 850, 578 P.2d 71 (Wash. App. 1978); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (Pa. 1977); *State* v. *Jackson*, 303 So.2d 734 (La. 1974); *Commonwealth* v. *McKenna*, 355 Mass. 313, 244 N.E. 2d 560 (Mass. 1969).

The petitioner argues that the *Miranda* warnings are a bright line rule which protects the police not the suspect. If the warnings are given and there is a waiver, no further inquiry is permitted. Such an approach subverts the protections of the Fifth Amendment. The *Miranda* rules were designed to protect the person in custody and to counteract some of the coercion inherent in the context of a custodial interrogation, but the rules were designed to deal soley with the coercive nature of custodial interrogation, not every problem that may arise in the context of a police investigation of a crime. *Brown* v. *Illinois*, *supra*, demonstrates this fact most clearly.

The government in this case would use the *Miranda* rules as a shield for official deception. Nowhere else in the criminal justice system are the parties permitted, indeed encouraged, to misrepresent matters. The prosecutor is prohibited from taking advantage of false testimony and failing to correct it. *See*, *Napue* v. *Illinois*, 360 U.S. 263 (1959). The law not only disfavors dishonesty between the parties but even officially disavows conduct between the parties that is not open, above board and designed to

assist in the process of obtaining the truth, *See, e.g.*, *Brady* v. *Maryland*, 373 U.S. 83 (1963) (obligating the prosecution to provide evidence favorable to the defense); *Wardius* v. *Oregon*, 412 U.S. 470 (1973) (rejecting a sporting theory of justice).

The constraints on defense lawyers are at least as great. A committee chaired by the Chief Justice has said that criminal defense lawyers must compel their clients to give them a "complete and candid" disclosure of what happened. Chief Justice Warren E. Burger, "Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards," 8 *American Crim. Law Quarterly* 1, 6 (1969). Defense attorneys are not permitted to encourage clients to give misleading information or to withhold information. *Id.* Obviously, they may not participate in any deception of the jury. *Id.* at 6. These standards are consistent with the view that the defense lawyer is one of the three essential components of the criminal court system. *Id.* at 3. The petitioner's position clashes with the essence of the standards set forth above.

In that same article the Chief Justice said:

> a court, dealing with a serious criminal charge, should not be regarded as a "court" unless it has the three entities I mentioned in the tripod illustration. Obviously a judge first, someone to present the charges and meet the standards of burden of proof; and finally an advocate for the accused.

Id. at 3. This identification of defense counsel as part of the court consistent with the traditional denomination of lawyers as officers of the court highlights the unacceptability of deception by law enforcement officials to defense counsel. No court would tolerate the deception visited upon Brian Burbine's lawyer, and no officer of the

court, including Brian Burbine's lawyer, should have to suffer that deception.[6]

The respondent does not seek adoption of the "New York" rule which would preclude waiver of the right to counsel without the presence of counsel, once the police know that a person is represented or an attorney has informed the police of the fact of representation. *See, e.g., People* v. *Hobson*, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976); *People* v. *Arthur*, 22 N.Y.2d 325, 239 N.E.2d 537, 292 N.Y.S.2d 663 (1968); *People* v. *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963). The Court of Appeals specifically did not adopt that rule. *Burbine* v. *Moran*, 753 F.2d at 187 (Pet. App. 20-21). The respondent merely asks that the police not be permitted to be deceptive with counsel or with a suspect in regard to the limited issue of communication with the suspect's lawyer. This case does not compel an answer to the question of whether the police must communicate to the suspect what was said by the suspect's attorney. The issue that must be resolved is whether the police may deceive an attorney with impunity.

The petitioner has suggested that the decision of the Court of Appeals would force police to answer their telephones "with trepidation." Pet. Brief at 31. This is simply nonsense. In the past the police have been perfectly capable of dealing with attorneys who call or come to the station to see clients. A concern is expressed over

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[6] This Court might also view the lawyer as the agent of the client; thus the lie to the lawyer is the equivalent of a lie to the client. This Court has recognized that there is a constitutional limit to the deception that may be employed directly with a client. *See Rogers* v. *Richmond*, 365 U.S. 534 (1961) (threat to apprehend petitioner's arthritic wife with a feigned telephone call).

whether the police will be able to establish that the person calling has a legitimate professional interest in the client. Pet. Brief at 31. The state's own witness, detective Ferranti, testified at the suppression hearing to the procedure he followed when he received a telephone call from a person who identified themself as an attorney. He said:

> My procedure, Mr. Casparian, as you well know, that even if I did receive a call—and that's how I would know—from anybody representing stating they were an attorney by telephone, I don't know they're an attorney and I get their phone number and I call them back to verify it. So if any calls came in, I would definitely have knowledge of that. I would not take anybody's word that they call up on the telephone and say they're an attorney without getting the phone number and calling them back.

(S.H. at 178-179) *See also*, *State* v. *Jackson*, 308 So.2d 734, 736 (1974), noting the simple expedient of calling a lawyer's office to verify that the caller is an attorney. Ironically, the petitioner is worried about possible misrepresentation by counsel, but not concerned with misrepresentation to counsel.

The petitioner has further suggested a parade of horribles in which defense counsel will be able to systematically stymie law enforcement throughout the country by sending a computerized list of clients to law enforcement authorities, in advance of any arrest. Pet. Brief at 32. This view simply ignores the narrow holding of the Court of Appeals. *Burbine* v. *Moran*, 753 F.2d at 187 (Pet. App. 20-21) The most obvious limitation on the scope of the decision of the Court of Appeals is that no obligation can be imposed upon the police prior to the apprehension of the accused and his or her placement in custody and prior to actual contact with the attorney apprising the police of the professional relationship. The decision of the Court of

Appeals is also limited to situations involving deception of an attorney. In its simplest form, this forecloses the doomsday forecast of the petitioner.

Whatever the rights of the police when dealing alone with a suspect are, including their right to engage in a certain amount of trickery or chicanery, this Court has never approved of a policy in which a professional in the criminal justice system—a lawyer, judge, or law enforcement official—is permitted and encouraged to engage in deception when dealing with another professional. Yet such encouragement is precisely the natural consequence of petitioner's argument.

The importance this Court has attached to the presence of counsel during interrogation is evident from its recitation of the ancillary benefits of such presence in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This Court noted that such presence would decrease the risk of untrustworthy statements, and the reporting of statements at trial. *Miranda* v. *Arizona*, 384 U.S. at 470. Indeed, the Court even suggested that there might be situations where the presence of counsel could permit questioning of a defendant even if the defendant desired to remain silent, because the presence of counsel would adequately protect a defendant against being compelled to make an involuntary statement. *Id.* at 474, n.44. The fact that more questioning of a defendant might be permitted with an attorney present was reiterated in *Michigan* v. *Mosley*, 423 U.S. 96, 101, n.8 (1975). The effect of this Court's decision was to make advice of counsel an integral part of the Fifth Amendment protections.

This Court has said that a primary purpose of the exclusionary rule is, "to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and sei-

zures." *United States* v. *Calenda*, 414 U.S. 338 (1974). The Court has further said:

> In a proper case this rationale would seem applicable to the Fifth Amendment context as well.
>
> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Michigan v. *Tucker*, 417 U.S. 433, 447 (1974).

There does not appear to be any dispute between the parties that a primary purpose of the *Miranda* guidelines is deterrence. The petitioner has said:

> The *Miranda* guidelines were to deter the police from using improper interrogation practices and violating the rights of the accused.

Pet. Brief at 34. The only thing that will deter the police from dealing deceptively with attorneys is a ruling by this Court that the deliberate or reckless misleading of the attorney in this case renders Brian Burbine's confessions inadmissible.

The issue in this case is deceit. Professor Yale Kamisar has considered this question in the same article to which the petitioner made reference. Pet. Brief at 35. He states:

> I do not claim that the Court will adopt the *Donovan* rule "bag and baggage, but I do believe that it will adopt the basic concept of the rule. I think that it, too, will be struck by the "incongruity" of permitting

> the state's attorney or the state's "badged and uniformed representative[s]" "to extract a confession from the accused while his own lawyer, seeking to speak with him, [is] kept from him by the police."
>
> The Court is even more likely to be offended when law enforcement officials treat the defense lawyer deceitfully or disdainfully, such as when they send an undercover agent against the suspect after his lawyer has done his best to prevent him from talking; mislead the defense lawyer as to where his client is being detained or about to be questioned; or "assure" the lawyer, or "agree" with him, that his client will not be questioned, but then do so "under deceptive auspices." [footnotes omitted]

Y. Kamisar, "*Brewer* v. *Williams*, *Massiah and Miranda:* What is 'Interrogation'? When Does it Matter?" in *Police Interrogation and Confessions*, at 217-219 (1980). In this case the defense lawyer was recklessly or deliberately misled.

II. THE DECEPTION COMMITTED BY THE POLICE AND THE FAILURE TO INFORM BRIAN BURBINE OF HIS ATTORNEY'S TELEPHONE CALL PRECLUDES A FINDING THAT THERE WAS A WAIVER OF HIS FIFTH AMENDMENT RIGHTS.

The petitioner devoted considerable space in its brief to the question of whether the respondent knowingly and voluntarily waived his *Miranda* rights, absent knowledge of his attorney's contacts with the police. The petitioner argues that all that is necessary for a valid waiver is the *Miranda* warnings, regardless of whether the police act deceitfully or honestly with respect to the attorney. This Court does not need to address the issue of whether, if the police deal honestly with the attorney, they have an obligation to inform the accused of his or her attorney's availability. As argued *supra*, because in this case the police

acted deceitfully, this Court need only decide what is the legal effect of such deceitful behavior. However, as petitioner has raised the more general waiver argument, Mr. Burbine has responded.

In determining whether or not to suppress the confessions at issue in this case, the Court of Appeals considered whether or not the respondent waived his *Miranda* rights consistent with the mandate of *North Carolina* v. *Butler*, 441 U.S. 369, 374-375 (1979). The Court considered the characteristics and behavior of the accused. *Burbine* v. *Moran* 753 F.2d. 178, 182-183 (1st. Cir. 1984) (Pet. App. 12). The defendant was not told that an attorney had called, was not told that the attorney had said she would make herself available if police wanted to question the defendant, and was not told that the attorney was told there would be no further questioning of the defendant for the night. *Burbine* v. *Moran*, 753 F.2d at 184 (Pet. App. 13).

The Court of Appeals considered the entire context in which the question of waiver arose. It specifically considered Burbine's relative youth; he was only 21. It also noted that he had a fifth grade education. *Burbine* v. *Moran*, 753 F.2d at 183 (Pet. App. 12). The Court of Appeals considered Mr. Burbine's limited prior exposure to the criminal justice system. He had one previous contact with the system that resulted in his current representation by the Public Defender's Office, though he had not yet met with the attorney to whom his case was assigned. It also considered Mr. Burbine's behavior during the time that the confessions were elicited, noting his ". . . 'fidgety' refusal to sign a waiver-of-rights form," his change of mind within ten minutes, and his tearful confession. *Id.* at 183-184 (Pet. App. 12).

The Court of Appeals took particular note of the efforts of the attorney calling on Mr. Burbine's behalf. It noted that the call was made after normal working hours by an experienced criminal defense lawyer. *Id.* at 184 (Pet. App. 13.) It noted that the attorney asked to be transferred to the detective division and specifically inquired if Mr. Burbine was going to be questioned or put in a line-up. The Court also noted that the attorney said she would be available if either would take place. *Id.* at 184 (Pet. App. 13)

The Court was very precise in assessing the impact of these police actions on the waiver of *Miranda* rights by Burbine. Had Burbine been informed about the conversation with his attorney, he would have known that the reason no lawyer was coming down to see him was that his attorney had been told that the police were through with him for the night. *Id.* at 184 (Pet. App. 14) He also would have learned that what the police were doing was different than what his attorney had been told would be done. *Id.* at 184 (Pet. App. 14)

In arguing that the waiver of *Miranda* rights was valid, the petitioner made the following observation:

> The record reveals that a telephone was available to him at all times (S.H. 23) and he knew his sister had called the police station and that she had gotten him help previously when he was arrested. (S.H. 216, 220)

Petitioner's Brief at 20-21.

The petitioner's own statement highlights just how important and significant the communication of the fact that Attorney Munson had called would have been to the respondent. He knew that in the past, his sister got help. This twenty-one year old man, with a fifth grade educa-

tion may not have understood the nuances of *Miranda* but he understood that his sister called the police station and in the past she brought help. He knew enough to rely on his sister; he only confessed when no help arrived.

The Court of Appeals assessed the failure to communicate with Burbine about the colloquy between his counsel and the police. He would have learned that he had not seen an attorney because there was no reason for such a meeting. He would have known that his sister had called the police station and that as in the past she had helped in communicating his plight to his attorney. It would have told him that he was not deserted; that his sister was still trying to help him; that the reason that there was no attorney was simply that there was no need for any further action. This would have been further re-inforced by telling Burbine that the police had told his counsel they were not going to place him in a line-up or interrogate him. The First Circuit reasoned that this combination of factors might well have changed his mind as to whether to confess and likewise whether to waive his rights.[7]

Many of the state courts which have considered this question have reflected the reasoning of the Oregon Supreme Court which said:

> To pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an

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[7] The United States has stated respondent was questioned about the murder after he refused to sign a waiver of rights form with respect to questioning about the breaking and entering. Brief of the Solicitor General at 10-11, n.5, citing *Michigan* v. *Mosley*, 423 U.S. 96 (1975). In fact, the petitioner was not questioned about the breaking and entering. See footnote 2, *supra*. This case is very different from *Michigan* v. *Mosley* in which the second interrogation involved a crime totally different from the crime that was the subject of the first interrogation.

> identified attorney actually available to provide at least initial assistance and advice, whatever might be arranged in the long run. A suspect indifferent to the first officer may well react quite differently to the second. If the attorney appears on request of one's family that fact may inspire additional confidence.

State v. *Haynes*, 602 P.2d at 278. *Haynes* is representative of the decisions of many state appellate tribunals, as previously identified.

In reaching its conclusion, the Court of Appeals in this case focused on the facts which were not in dispute. In determining whether or not there was a waiver, the Court was compelled to determine if someone who had not cooperated on two different occasions, might have been affected by the knowledge of what had transpired between his attorney and the police. The petitioner has suggested the record shows a suspect anxious to unburden his soul and tell all. Pet. Brief at 27-28. On the contrary, the respondent was arrested about 3:00 p.m., refused to speak when questioned about the homicide between 5:00 and 6:00 p.m., denied involvement in the homicide about three hours after, and only afterwards confessed.

The action of the police in keeping Attorney Munson from her client runs counter to one of the central themes of *Miranda*, that one has the right to have an attorney present during any questioning by the police. *Miranda* not only affirms the right of a defendant to refuse to be questioned without a lawyer, but concomitantly the right to have a lawyer present during questioning. This Court said:

> Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.

Miranda v. *Arizona*, 384 U.S. at 469. The *sine qua non* of that right is that the lawyer must have access to the client.

The decision of the Court of Appeals is responsive to *Miranda*. It implements one of the basic tenets of *Miranda*, that a person has a right to have an attorney present during questioning of the police. It recognizes that when the police turn an attorney away from the police station door, the effect is to deny the right to have an attorney present during questioning. The Court of Appeals specifically rejected the "New York" rule or any approach that would require the presence of a person's lawyer before there was a waiver of the privilege against self-incrimination. All the Court of Appeals did was say that this very significant decision should not be made without informing the defendant of very pertinent information involving his attorney.

III. BRIAN BURBINE'S SIXTH AMENDMENT RIGHTS PROVIDE AN INDEPENDENT BASIS FOR AFFIRMING THE DECISION OF THE COURT OF APPEALS.

The First Circuit Court of Appeals decided this case on Fifth Amendment grounds alone. The respondent has consistently argued that the Sixth amendment guarantee of a right to counsel provides an independent basis for relief. At the time of his interrogations, Brian Burbine was represented by legal counsel, who had contacted the police and apprised the police of her professional representation of the respondent. On these facts, respondent submits, his Sixth Amendment right to counsel was implicated and subsequently violated when the police falsely informed his attorney that there would be no interrogation and then proceeded to question him, without advising him of his attorney's availability.

A. At The Time Of The Interrogations, Brian Burbine Was Represented By Legal Counsel.

Brian Burbine's sister contacted the Public Defender's Office on the night of June 29, 1977, seeking help for her brother who, as far as she knew, had been arrested on a charge of breaking and entering and was being held by the Cranston police. At the time, Mr. Burbine was a current client of the Public Defender's Office. When Attorney Allegra Munson subsequently telephoned the Cranston police station a short time later, she was acting as Brian Burbine's attorney. Attorney Munson identified herself as an attorney in the Public Defender's office and asked if Mr. Burbine was being held. Receiving an affirmative response, Ms. Munson informed the officer on the phone that Brian Burbine was being represented by the Public Defender's Office and, if the police intended to interrogate Mr. Burbine or place him in a lineup, she would be available. When Ms. Munson was assured by the officer that the police had no intentions of questioning Brian Burbine or placing him in a lineup, Attorney Munson terminated the call.

In the criminal law context, the actions required to establish the attorney/client relationship must be considered in light of what is practical under the circumstances. Consequently, courts have held that the relationship can exist if the attorney has been contacted by a member of the defendant's family, without the defendant's knowledge, *Weber* v. *State*, 457 A.2d 674 (Del. 1983); *State* v. *Haynes*, 41 Ore. App. 465, 602 P.2d 272 (Ore. *en banc* 1979); *Commonwealth* v. *Hilliard*, 471 Pa. 318, 370 A.2d 322 (Pa. 1977); *State* v. *Jackson*, 303 So.2d 734 (La. 1974). The critical fact common to these and similar cases recognizing the existence of an attorney/client relationship is that the lawyer was affirmatively acting on the defen-

dant's behalf—*e.g.*, attempting to speak with the defendant, *Commonwealth* v. *Hilliard*, *supra*, or, finding out that the police intend to interrogate and instructing the police not to question the defendant, *State* v. *Jackson*, *supra*.

This case presents a classic illustration of the creation of an attorney/client relationship in the criminal law area. An individual is arrested. His sister, aware that her brother has been taken into custody, contacts an attorney (one whose office already represents the brother in another criminal matter). The attorney calls the police station to confirm the fact that the client is being held, and to determine what action, if any, the police intend to take with respect to the client. The attorney indicates that, if the police intend to interrogate the client or place him in a lineup, she will be present to provide legal counsel. Given the information imparted to Ms. Munson by the police, the attorney did everything any lawyer would do, and her actions must be held to have established the requisite attorney/client relationship[8]

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[8] While the requirement that there be some sort of "meeting of the minds," or some conduct on the part of both parties implying a professional relationship may make sense in the context of the civil law, it simply ignores the reality of what happens in the criminal context. The requirement of a bilateral agreement in the civil law is necessary because, in that context, often the issue of whether an attorney/client relationship exists will determine whether the client will be legally bound by the attorney's actions. To the extent that the attorney is an agent, the actual or apparent agreement of the client—principal—is required. This consideration is not relevant in this context. If this Court insists that the requirement of a bilateral agreement be met in the criminal law as well, then any attorney who is asked to represent someone who has been arrested and is in custody will be able to do nothing but wait for the call from the accused. If the police permit that call, there is nothing to be concerned about. But, if

When a suspect is arrested and immediately taken into custody, as happened in this case, s/he usually does not have the opportunity to contact and formally retain a lawyer. In that situation, it is more likely that a third person, aware of the arrest, will contact an attorney on behalf of the accused, without his or her knowledge. Only if the law accepts such a factual predicate as establishing the attorney/client relationship will a lawyer have any legal authority to protect the accused's rights in the station house.

B. Brian Burbine's Sixth Amendment Right To Counsel Had Accrued At The Time Of His Interrogations, Because He Had An Attorney Who Had Contacted The Police, And Affirmatively Attempted To Intercede On His Behalf.

In *United States* v. *Gouveia*, 104 S.Ct. 2292 (1984), this Court, reiterating language from prior Sixth Amendment cases, held that the respondents, who were prisoners suspected of committing crimes while in prison, were not entitled to have attorneys appointed for them before charges were officially brought and formal judicial proceedings had taken place. At the beginning of the *Gouveia* decision, Mr. Justice Rehnquist, writing for the majority, stated that the Court was presented with a "narrow" issue, framed as follows: "Whether the Sixth Amendment requires the appointment of counsel for indigent inmates in respondent's situation." *Id.* at 2296 n.1. The Court noted that the respondents were never denied the opportunity to retain their own private counsel while in segre-

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the police refuse a request for an attorney, the defendant can only hope that some trial justice will believe him or her when s/he testifies that the police did not honor his or her request. Given what so often happens at suppression hearings, the chances are very good that the defendant's prayers will go unanswered.

gation—indeed, the inmates had visitation privileges and the right to unmonitored phone calls to attorneys.

This case, however, does not concern the right to appointed counsel. Mr. Burbine already *had* counsel, and the police, by interfering with the attorney/client relationship, violated his Sixth Amendment right. This issue was not presented to this Court in *Gouveia*, was not addressed by this Court in its decision in *Gouveia*, and, indeed, has not been addressed by this Court since *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

The *Gouveia* opinion delineated the purpose served by the Sixth Amendment right to counsel—a purpose that warrants a finding that the right to counsel attached in this case. As. Mr. Justice Rehnquist wrote:

> We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*," 413 U.S. 300, 309, 93 S.Ct. 2568, 2573, 37 L.Ed.2d 619 (1973). Indeed the right to counsel
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> > "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938).
>
> Although we have extended an accused's right to counsel to certain "critical" pre-trial proceedings, *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), *we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or*

> *by his expert adversary or by both," United States* v. *Ash, supra,* at 310, 93 S.Ct. at 2574 *in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." United States* v. *Wade, supra,* 388 U.S. at 224, 87 S.Ct., at 1930.

Id. at 2298 (emphasis supplied).

Other than perhaps the trial itself, respondent cannot imagine a stage more critical and more determinative of the defendant's fate than custodial interrogation. As Brian Burbine sat alone and uncounseled in the police station, he was faced with "expert adversaries"—*i.e.* seasoned police detectives who were highly skilled and experienced in the art of interrogation. The outcome of the three separate interrogation sessions carried out by the police sealed Brian Burbine's fate and assured a guilty verdict. The trial that followed was, in the words of *Esdobedo* v. *Illinois,* 378 U.S. at 487, "no more than an appeal from the interrogation."

In *Gouveia,* the majority of this Court did not find that the inmates in question were facing a critical stage of criminal proceedings in which they needed attorneys to intercede between them and prosecutorial forces. The respondents in *Gouveia* had not been subjected to custodial interrogation—they simply had been placed in administrative detention while the authorities investigated the crimes they were suspected of committing. The inmates' stated need for attorneys was not to advise them whether or not to waive their pre-interrogation rights, but merely to investigate charges that had not yet been formally brought against them. The respondents in *Gouveia* were not held incommunicado and, in fact, had access to attorneys, Furthermore, the majority in *Gouveia* did not consider that the inmates had been suffi-

ciently "accused" so as to implicate the Sixth Amendment.

This case is wholly different, and thus *Gouveia* does not settle the Sixth Amendment question presented here. Unlike the respondents in *Gouveia*, Brian Burbine actually had an attorney who had contacted the police in an effort to ascertain Mr. Burbine's status and intercede if necessary. Unlike the respondents in *Gouveia*, Brian Burbine was confronted by prosecutorial authorities whose sole purpose was to get him to incriminate himself in a homicide. Brian Burbine, as much as an indicted defendant, was marked by police as a murderer and was in no position to clear himself of the charges by talking to the police, for they were convinced that he had committed the crime.

Mr. Burbine is not asking this Court to hold that the Sixth Amendment right to counsel attaches when the police subject a defendant to custodial interrogation. Mr. Burbine does ask this Court to hold that when the police intend to interrogate a suspect, and the police have been contacted by an attorney for that suspect, the police violate the Sixth Amendment right to counsel if they mislead the attorney about their intentions with regard to interrogation and fail to inform the suspect of his or her attorney's availability. In *Brewer* v. *Williams*, 430 U.S. 387 (1977), this Court found a right to counsel in a case in which the defendant had not been indicted, but merely arraigned on a fugitive from justice warrant. Respondent submits that *Brewer* stands for a broader proposition that is based partly on the formalization of judicial proceedings, but predominantly on the fact that counsel was present and representing the defendant prior to interrogation. *Brewer* indicates a condemnation by this Court of any efforts made by the police to interject themselves

between a criminal defendant and his or her attorney. Mr. Justice Stewart, writing the *Brewer* opinion, stated:

> It is argued that this agreement [by police not to interrogate Williams in the absence of his counsel] may not have been an enforceable one. But we do not deal here with notions of offer, acceptance, consideration, or other concepts of the law of contracts. We deal with constitutional law. And every court that has looked at this case has found an "agreement" in the sense of a commitment made by the Des Moines Police Officers that Williams would not be questioned about Pamela Powers in the absence of his counsel.

Id. at 401, n.8. And, As Mr. Justice Stevens wrote in his concurring opinion in *Brewer*, at 415:

> Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentialy dangerous person. Under any analysis, this was a critical stage of the proceedings in which the participation of an independent professional was of vital importance to the accused and to society. At this stage—as in countless others in which the law profoundlly affects the life of the individual—the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

Like the lawyer in *Brewer*, Brian Burbine's attorney relied on the assurances given to her by the police that her client would not be interrogated.

Other courts, in cases with similar fact patterns, have held that, once an attorney enters a case, the police cannot deliberately or recklessly frustrate the lawyer's attempts to represent his or her client without running afoul of the Sixth Amendment. *See, e.g., United States ex rel. Magoon* v. *Reincke*. 415 F.2d 69 (2d Cir. 1969) (defendant gave statements to the police after his attorney had requested that the interrogation of his client cease until the attorney could be present); *United States* v. *Wedra*, 343 F. Supp. 1183 (S.D.N.Y. 1972) (attorney went to police station to see client and was told that client would not be interrogated, whereupon the attorney left the police station and the police interrogated the defendant);[9]

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[9] In *United States* v. *Wedra*, *supra*, Judge Edward Weinfeld, of the United States District Court for the Southern District of New York, wrote:

> This case in some respects is a variant of *Escobedo* v. *Illinois* [citation omitted]. There the authorities, aware a suspect had retained an attorney, engaged in custodial interrogation of him, and refused to permit the attorney to be present at his questioning, although both sought this. Here, the authorities, aware the defendant had an attorney, and also that he had already advised his client to exercise his Fifth Amendment right to remain silent, effectively deprived the defendant of his right to the presence of counsel by assurances that the client would not be questioned, whereupon the attorney left his client, whereas in fact, the authorities intended to and did question the defendant in the absence of his counsel. "Just as surely as in *Escobedo*, the law officers here prevented the defendant's attorney from consulting with his client. Neglect to notify counsel of a planned interrogation is as effective in preventing consultation as the physical barrier which confronted Escobedo's attorney at the jailhouse door." [citations omitted].

Id. at 1185 to 1186.

Like Brian Burbine, the defendant Wedra initially indicated a desire not to talk to the police, and the state claimed that Wedra's change of heart occurred after a waiver of *Miranda* rights. Judge Weinfeld rejected this argument, stating that:

> Once counsel has been retained and he is known to the inter-

State v. *Haynes*, 602 P.2d 272 (Ore. *en banc* 1979) (attorney, retained by defendant's wife, told police he was coming to the station to meet with defendant but, before attorney arrived, police drove the defendant away and interrogated him at another location); *Commonwealth* v. *McKenna*, 244 N.E.2d 560 (Mass. 1969) (attorney, contacted by defendant's aunt, told by police that interrogation would take place in one police station, attorney went to that station, only to find out that police interrogated the defendant elsewhere); *State* v. *Jackson*, 303 So.2d 734 (La. 1974) (attorney called police station and requested that the defendant not be questioned until he could arrive, but police went ahead and interrogated the defendant anyway). In *Escobedo* v. *Illinois*, *supra*, the defendant's attorney was turned away by the police. *Miranda* v. *Arizona*, 384 U.S. 436, 465 n.35 (1966) held that this action "independent of any other constitutional proscription . . . constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake . . ."

The deception committed by the police in this case went straight to the heart of the attorney/client relationship. The police knew that Brian Burbine was represented by an attorney, who asked directly whether her client was

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rogators, the right to have him present does not depend upon the accused asserting a formal demand for his presence, at least where, as here, the interrogators have already been advised that the client is not to be questioned in the absence of counsel and they have given assurances to that effect.

Id. at 1186.

In summation, Judge Weinfeld stated:

The procedural safeguards to protect essential constitutional rights intended under the *Miranda* and *Escobedo* rules would become empty ritual and would be seriously undermined if the practice here indulged in were permitted.

Id. at 1187.

going to be interrogated. The answer she received—that there would be no interrogation—was absolutely false—and because she believed that falsehood, the attorney did nothing further to intercede on behalf of her client. If Attorney Munson had been told that the police intended to question Brian Burbine about the homicide, there is no doubt that she would have gone immediately to the police station, perhaps with another attorney in tow to act as a witness, and would have demanded to meet with Mr. Burbine in person. Indeed, the common practice among police departments in Rhode Island is to provide attorneys access to their clients who are in custody, if such is demanded. If Attorney Munson, once at the station, was prohibited from advising her client, she could have attempted to contact a judge, for a court order, or contacted the Attorney General or the Chief of Police to gain access to Mr. Burbine. At the very least, if all else failed, Attorney Munson would have appeared in district court the next day for Mr. Burbine's arraignment. It was just such professional involvement that the police deception successfully prevented. Mr. Burbine submits that in a case such as this, which involves deliberate or reckless interference with the attorney/client relationship, the proscriptions against violating the Sixth Amendment right to counsel come into play, and provide independent support for the decision of the First Circuit Court of Appeals.

IV. THE DECEPTION PERPETRATED BY THE POLICE WAS SO EGREGIOUS AS TO DENY MR. BURBINE THE FUNDAMENTAL FAIRNESS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

In addition to his claims that the police misconduct in this case violated his Fifth and Sixth Amendment rights, Brian Burbine has consistently maintained that the

actions of the police in falsely informing his attorney that there would be no interrogation when, in fact, interrogation was imminent, were so egregious as to deprive him of the fundamental fairness guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution. In *Rochin* v. *People of California*, 342 U.S. 165 (1952) this Court reversed a conviction because the means by which evidence was obtained "shock[ed] the conscience." 342 U.S. at 172. As the court in *Rochin* said:

> Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 332, 78 L. Ed. 674, or are "implicit in the concept of ordered liberty." *Palko* v. *State of Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 288.

Rochin v. *People of California*, 342 U.S. at 169 (footnote omitted)

Clearly the behavior in this case is different than the behavior in *Rochin*. In *Rochin* the defendant's stomach was pumped against his will and the court found this behavior too offensive and too close to the traditional concepts of torture to be tolerated. *Rochin* v. *People of California*, 342 U.S. at 172. In this case the offensive behavior of the police was not physical. That does not mean however, that it cannot shock the conscience.

In *Darwin* v. *Connecticut*, 391 U.S. 346 (1968), the defendant was arrested on a coroner's warrant charging him with murder. He was subjected to interrogation for an entire day, and questioning continued the next morning until, by the late afternoon, the defendant gave in and confessed. The police continued to hold Darwin, and got

another confession from him on the third day, and also got the defendant to reenact the crime. During the entire period the defendant was in custody, his attorney had made countless efforts to contact him or the officer in charge of his client. In fact, at one point, the attorney went to the police station where Darwin was being held, but, at that same time, the police put Darwin in a car and drove him around the area, supposedly to avoid newspaper reporters. Counsel made other visits, and other attempts to gain access to his client, but all these attempts were met with disclaimers by the police of knowledge of Darwin's whereabouts or the whereabouts of the officer in charge.

Since the trial in Darwin occurred prior to the decisions in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964) and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the *Darwin* court held that those rulings were not controlling. The Court, however, reversed Darwin's conviction, "[c]onsidering the 'totality of the circumstances' . . . ," including the denial of access to counsel. *Darwin* v. *Connecticut*, 391 U.S. at 349.

While admittedly, the length of incarceration in *Darwin* was much greater than in this case, Brian Burbine suffered the same effects. As noted above, Mr. Burbine, at the time of his arrest, was only twenty-one years old, and had completed only the fifth grade. His prior contacts with the criminal justice system were minimal. He had one pending charge on a breaking and entering offense, and had yet to meet with his attorney with regard to that case. Although there was some mention in the transcript of the suppression hearing by Mr. Burbine that his sister helped him out of problems with the law, there is no indication in the record that Brian Burbine had ever been interrogated before with regard to those incidents.

The petitioner argues that Mr. Burbine was well aware of his rights, and his ability to secure counsel, because he said that his sister had helped him in the past. Yet, precisely because no one—particularly an attorney—showed up to help him that night, Mr. Burbine must have assumed that his sister had deserted him, and that no outside help would be forthcoming. Consequently, after two attempts to forestall questioning about the homicide, Brian Burbine finally capitulated.

Standards which are part of the tradition and conscience which is identified as the core element of the fairness doctrine guaranteed by the Fourteenth Amendment in the United States Constitution need not be limited to situations in which there is physically offensive bahavior by law enforcement officials. *Rochin* v. *California*, 342 U.S. at 169. There is no easy way to identify what the traditions and conscience of the country are. Indeed *Rochin* acknowledged that inevitably there was a certain amount of line drawing in determining what type of behavior offends the due process clause of the Fourteenth Amendment. 342 U.S. at 174. In asking that question, what is really being asked is what is the minimum acceptable level of police behavior that our society will tolerate. The petitioner has characterized the First Circuit's holding with respect to the applicable type of police behavior as the following:

> Deliberate or reckless misleading of an attorney, who has a legitimate, professionally ethical interest in a suspect in custody and who expresses to the police a desire to be present at any interrogation of the suspect, combined with a police failure to communicate that exchange to the suspect. . . .

Petitioner's Brief at 31.

The type of police misconduct described above meets the standards established in *Rochin*, and would support a ruling by this Court, limited to the facts of this case, that the police violated Mr. Burbine's right to fundamental fairness as guaranteed by the due process clause of the Fourteenth Amendment. There could be no clearer indication that police misconduct of this kind is generally condemned than the decisions of the vast majority of state appellate tribunals that have considered the question and have found such conduct unacceptable, albeit pursuant to different constitutional provisions. Indeed, respondent submits, the American public would be very shocked to learn otherwise—*i.e.*, that the police may deceive an attorney with impunity.

V. THE FIRST CIRCUIT COURT OF APPEALS COMPLIED FULLY WITH THIS COURT'S HOLDING IN *SUMNER* V. *MATA*, 455 U.S. 591 (1982), AND MERELY MADE ADDITIONAL, AMPLY SUPPORTED FACTUAL FINDINGS THAT HAD NOT BEEN MADE BY THE STATE COURTS AND THAT HAVE BEEN CONCEDED BY THE PETITIONER.

The petitioner has challenged the decision of the First Circuit Court of Appeals on the ground that the Court failed to give adequate deference to the state court's factual findings. In habeas corpus proceedings, generally, state court findings of fact are entitled to a presumption of correctness by the federal courts. *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982). In this case, the state court trial judge made only two factual findings relevant to the issue at bar. The judge made the critical factual finding that Attorney Munson's telephone conversation took place as she had testified, and the First Circuit gave that factual finding a presumption of correctness, as it should have done. The only other pertinent finding the trial judge made was that there was no conspiracy or collusion on the

part of the Cranston police to keep Mr. Burbine away from his attorney. The First Circuit also gave full faith and credit to the finding. However, the First Circuit realized that the finding of no conspiracy in no way answered the plain and uncontested fact that Attorney Munson was given blatantly false information. Neither the trial judge, the Rhode Island Supreme Court, or the federal district court made any findings with respect to whether one police officer, acting alone, deliberately decieved Attorney Munson or whether the police acted recklessly. *Burbine* v. *Moran*, 753 F.2d at 185 (Pet. App. 16) Those findings were made by the First Circuit Court precisely because it was obligated to accept that Attorney Munson's phone call took place as she testified, and as the trial judge accepted.

The central factual question in this case was did Attorney Allegra Munson call the Cranston Police Station on behalf of Brian Burbine on the night of his apprehension. The state took the position at the suppression hearing that she did not. *Burbine* v. *Moran*, 753 F.2d. at 186 (Pet. App. 18). At the suppression hearing, the state did not attempt to excuse what happened by claiming that some unnamed, unknown officer answered the phone and gave Attorney Munson the wrong information without realizing that Mr. Burbine was the target of a homicide investigation. The prosecution's position at the suppression hearing was that the witnesses for the defense, including Attorney Munson, were lying. The Cranston police officers who testified at the hearing made it clear that if anyone had called the station, inquiring about Brian Burbine, that call would have been directed to one of three people—Captain Ernest DelMonico, the officer in charge of the station that night, Detective Ricard or Detective Ferranti. The testimony of these police officers was totally inconsistent with any "confusion" theory. The

Cranston police officers testified about what happened when a telephone call was received. Lt. Ricard testified as follows:

> Q. And just to clarify again from questions Mr. Casparian was asking you, if the call came in to speak to someone in reference to someone that was being held at the Cranston Police Department, that call could have been or should have been referred to the detectives, is that right?
>
> A. Yes, that's correct.
>
> Q. Or it could have been referred to an officer in charge of the station?
>
> A. That's correct.
>
> Q. Which would be a senior captain?
>
> A. Yes.
>
> Q. And those are the two places it would have been referred?
>
> A. Yes.

(S.H. at 143) The senior captain denied receiving a call. (S.H. 264-265). Furthermore, all the Providence police present in the Cranston station at the time of Attorney Munson's phone call denied speaking with the attorney. While there may have been other officers who were in and out of the detective division that night, they were working on unrelated investigations, and would not have spoken with Attorney Munson.[10] None of the police involved in the Burbine investigation testified that another police officer answered the phone that night, and the Cranston police officers' testimony indicated that any call coming in

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[10] *See* Footnote 3, *supra*.

for Brian Burbine would have been referred to one of them, yet they all denied receiving one.

The petitioner concedes that:

> [t]here were no facts in the record to explain the circumstances of receipt of the unverified phone call at the Cranston Police Station.

Pet. Brief at 26. That concession is consistent with the analysis of the Court of Appeals, *Burbine* v. *Moran*, 753 F.2d at 185-186 (Pet. App. 16-19, and rebuts any attempt, at this late date, to claim that whoever spoke with Attorney Munson acted in good faith. The reason why there is no evidence in the record to explain the phone call is because, at the suppression hearing, the state wanted the trial judge to believe that Attorney Munson was lying and the phone call was never made. The First Circuit, having to give full faith and credit to the trial judge's finding that the call *was* made, was faced with a record that belied any notion that the misrepresentation to counsel was due to confusion. *Burbine* v. *Moran*, 753 F.2d at 185-186 (Pet. App. 17-18) The First Circuit, looking at the whole record, observed that the two police departments had worked hand in hand on the night in question, particularly noting the testimony of the five officers who could have received the telephone call. *Burbine* v. *Moran*, 753 F.2d at 186 (Pet. App. 17). The First Circuit properly realized that the finding that there was no collusion or conspiracy among the police did not resolve the possibilities as to how the attorney for Mr. Burbine was misinformed. That finding answered a non-existent question. Indeed, one has to question how a conspiracy would ever have developed unless the police knew in advance that Mr. Burbine's attorney was going to call. It is not the existence or non-existence of a conspiracy or other joint collusive effort that is the issue in this case. Thus, the

First Circuit determined that an individual Cranston police officer must have deliberately or recklessly misrepresented matters to Burbine's attorney. As the First Circuit noted this would not abrogate police responsibility for the misrepresentation. *Burbine* v. *Moran*, 753 F.2d at 185 (Pet. App. 16), citing *United States* v. *Downing*, 665 F.2d 404, 405-07 (1st Cir. 1981) in which a *Miranda* violation was established even though the officer conducting the latter half of the interrogation did not know that an officer involved previously had been told the suspect wanted an attorney. *See also, United States* v. *Wedra*, 343 F.Supp. 1183, 1188 (S.D.N.Y. 1972). *Cf., United States* v. *Augurs*, 427 U.S. 97 (1976); *Santobello* v. *New York*, 404 U.S. 257 (1971); *Brady* v. *Maryland*, 373 U.S. 83 (1963).

In reaching its conclusion that either the person who spoke with Attorney Munson acted deliberately or, at the least, recklessly, the First Circuit simply came to the only conclusions it could on the basis of the record in this case. It was on the basis of the factual findings made by the state court, coupled with the clear, uncontested facts on the record, that the First Circuit found that the officer who spoke with Attorney Munson acted deliberately or, at the very least, was inexcusably reckless. The petitioner concedes that Attorney Munson was grossly misinformed and that the police failed to advise Brian Burbine of his attorney's availability. As the petitioner has also conceded that there is no evidence whatsoever on the record to support his lame excuses for what happened, offered now much too late, the First Circuit's findings cannot be faulted. The First Circuit made additional factual findings that were necessary to truly give full force and effect to those findings already made by the state courts, and thus the First Circuit was well within its authority. *See, e.g., Brewer* v. *Williams*, 430 U.S. 387 (1977) (Supreme Court upheld lower federal court's relevant findings of fact not

made by the state courts when those factual findings were necessary to proper enforcement of federal rights); *Whitus* v. *Georgia*, 385 U.S. 545 (1967) (It is the province of the Supreme Court to analyze facts in order that appropriate enforcement of federal rights may be assured); *Norris* v. *Alabama*, 294 U.S. 587 (1935) (It is incumbent upon the Court to analyze facts in order to assure proper enforcement of federal rights.)

Respondent submits that, if this Court should determine that the First Circuit exceeded its authority in making further factual findings, the appropriate remedy would be to remand this case to the state trial court so that it can make the additional factual findings that are necessary to resolve the issues raised herein.

CONCLUSION

The petitioner has argued that the position adopted by the Court of Appeals will bring chaos to the criminal justice system.

The real chaos in the system will come from a rule which sanctions and encourages police deception when dealing with lawyers and suspects. At no time has the petitioner suggested where the line on police deception should be drawn. The respondent submits that the line should be drawn in this case.

For the reasons stated above the respondent respectfully requests that the judgment of the First Circuit Court of Appeals should be affirmed.

Respectfully Submitted,

ROBERT B. MANN
130 Pitman St.
Providence, Rhode Island 02906

WILLIAM F. REILLY
Public Defender

PAULA ROSIN
Assistant Public Defender
Appellate Division
Office of the Public Defender
250 Benefit St.
Providence, Rhode Island